

DOYLE WAYNE SMITH,)
)
 Plaintiff,) No. CV-10-0453-CI
)
 v.) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT,
) IN PART, AND REMANDING FOR
 MICHAEL J. ASTRUE, Commissioner) ADDITIONAL PROCEEDINGS
 of Social Security,)
)
)
 Defendant.)
)

JURISDICTION

Plaintiff applied for Supplemental Security Income (SSI) on January 23, 2008. (Tr. 16.) He alleged disability due to depression, PTSD, arthritis, carpal tunnel syndrome of the right hand, low back pain, and high blood pressure, with an onset date of June 4, 2002. (Tr. 148.) After benefits were denied initially and on reconsideration, Plaintiff requested a hearing before an

Plaintiff applied for Supplemental Security Income (SSI) on January 23, 2008. (Tr. 16.) He alleged disability due to depression, PTSD, arthritis, carpal tunnel syndrome of the right hand, low back pain, and high blood pressure, with an onset date of June 4, 2002. (Tr. 148.) After benefits were denied initially and on reconsideration, Plaintiff requested a hearing before an

1 administrative law judge (ALJ), which was held before ALJ James W.
2 Sherry on December 16, 2009. (Tr. 35-62.) Plaintiff, who was
3 represented by counsel, and vocational expert (VE) Daniel R.
4 McKinney, Sr., testified. The ALJ denied benefits on February 22,
5 2010, and the Appeals Council denied review. (Tr. 1-5, 16-27.)
6 Plaintiff's claim is before this court pursuant to 42 U.S.C. §
7 405(g).

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 The decision of the Commissioner may be reversed only
12 if it is not supported by substantial evidence or if it is
13 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
14 1097 (9th Cir. 1999). Substantial evidence is defined as
15 being more than a mere scintilla, but less than a
16 preponderance. *Id.* at 1098. Put another way, substantial
17 evidence is such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
20 evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment
22 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
23 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
24 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
29 *de novo*, although deference is owed to a reasonable
30 construction of the applicable statutes. *McNatt v. Apfel*,
31 201 F.3d 1084, 1087 (9th Cir. 2000).

32 It is the role of the trier of fact, not this court, to resolve
33 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
34 supports more than one rational interpretation, the court may not
35 substitute its judgment for that of the Commissioner. *Tackett*, 180
36 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 Nevertheless, a decision supported by substantial evidence will be
 2 set aside if the proper legal standards were not applied in weighing
 3 the evidence and making the decision. *Browner v. Secretary of*
 4 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 5 there is substantial evidence to support the administrative
 6 findings, or if there is conflicting evidence that will support a
 7 finding of either disability or non-disability, the finding of the
 8 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 9 1230 (9th Cir. 1987).

10 SEQUENTIAL EVALUATION

11 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 12 requirements necessary to establish disability:

13 Under the Social Security Act, individuals who are
 14 "under a disability" are eligible to receive benefits. 42
 15 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 16 medically determinable physical or mental impairment"
 17 which prevents one from engaging "in any substantial
 18 gainful activity" and is expected to result in death or
 19 last "for a continuous period of not less than 12 months."
 20 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 21 from "anatomical, physiological, or psychological
 22 abnormalities which are demonstrable by medically
 23 acceptable clinical and laboratory diagnostic techniques."
 24 42 U.S.C. § 423(d)(3). The Act also provides that a
 25 claimant will be eligible for benefits only if his
 26 impairments "are of such severity that he is not only
 27 unable to do his previous work but cannot, considering his
 28 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

In evaluating whether a claimant suffers from a
 disability, an ALJ must apply a five-step sequential
 inquiry addressing both components of the definition,
 until a question is answered affirmatively or negatively
 in such a way that an ultimate determination can be made.
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and

1 detailed objective medical reports of h[is] condition from
2 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

3 The Commissioner has established a five-step sequential
4 evaluation process for determining whether a person is disabled. 20
5 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
6 137, 140-142 (1987). In steps one through four, the burden of proof
7 rests upon the claimant to establish a prima facie case of
8 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
9 920, 921 (9th Cir. 1971). This burden is met once a claimant
10 establishes that a physical or mental impairment prevents him from
11 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
12 416.920(a). At step five, the burden shifts to the Commissioner to
13 show that (1) the claimant can perform other substantial gainful
14 activity; and (2) a "significant number of jobs exist in the
15 national economy" which claimant can perform. 20 C.F.R. §§
16 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
17 1498 (9th Cir. 1984).

18 STATEMENT OF THE CASE

19 The facts of the case are set forth in detail in the transcript
20 of proceedings and are briefly summarized here. At the time
21 Plaintiff applied for SSI, he was 50 years old. (Tr. 40.)
22 Plaintiff reported he completed the 11th grade in school and later
23 obtained his GED. (Tr. 41.) Plaintiff was single and lived in an
24 apartment with a friend at the time of the administrative hearing.
25 (Tr. 41.) His sole source of income at the time was public
26 assistance. (Tr. 42.) Plaintiff indicated he had no reported
27
28

1 earnings from work after 2001¹ and was able to get by with the
2 assistance of friends. (Tr. 43-44.) Plaintiff stated, in 2001, he
3 experienced nightmares and flashbacks as a result of trauma from
4 having to deal with the murder of his father by his brother. (Tr.
5 44-45.) He started using drugs at that time. (Tr. 46.) Plaintiff
6 testified he stopped using drugs on February 3, 2008, but used on
7 one occasion after that date, in October 2008. (Tr. 46-47, 53.) He
8 reported he has been clean and sober since that time. (Tr. 47-48.)
9 Plaintiff stated he cannot work "[m]ainly because of the PTSD. . .
10 . I'm apt to go off at any given time." (Tr. 55.)

11 ADMINISTRATIVE DECISION

12 At step one, ALJ Sherry found Plaintiff had not engaged in
13 substantial gainful activity since the application date. (Tr. 18.)
14 At step two, the ALJ found Plaintiff had severe impairments of
15 "posttraumatic stress disorder; anxiety disorder; major depressive
16 disorder; polysubstance dependence; lumbar degenerative disk
17 disease; right inguinal hernia; and mild atherosclerosis of the left
18 anterior descending artery." (Tr. 18.) At step three, the ALJ
19 found Plaintiff's impairments, alone and in combination, did not
20 meet or medically equal one of the listed impairments in 20 C.F.R.
21 Part 404, Subpart P, Appendix 1 (Listings). (Tr. 19.) The ALJ
22 specifically considered Listings 1.04, 12.04 and 12.06. (Tr. 19.)
23 The ALJ determined Plaintiff could perform light exertion-level work
24 with lifting up to 20 pounds at a time, frequent lifting and/or

25 ¹ Plaintiff did testify he had performed freelance landscaping
26 work for which he was paid "under the table" approximately six years
27 prior to the administrative hearing. (Tr. 55-56.)
28

1 carrying 10 pounds, standing/walking six hours out of an eight hour
2 workday, sitting six hours out of an eight hour workday, and
3 unlimited pushing/pulling within lifting restrictions. (Tr. 21.)
4 The ALJ's residual functional capacity (RFC) assessment also
5 included the following restrictions:

6 The claimant can occasionally climb ladders, ropes or
7 scaffolds. The claimant can occasionally climb ramps or
8 stairs. The claimant can occasionally balance. The
9 claimant can occasionally stoop, crouch, kneel and crawl.
10 The claimant must avoid concentrated exposure to
11 unprotected heights. The claimant must avoid concentrated
12 use of moving machinery. The claimant is capable of
13 simple, routine and repetitive tasks. The claimant must
14 have only occasional superficial contact with the public
15 and coworkers. The claimant may need to be shown changes.

16 (Tr. 21.) The ALJ found Plaintiff's medically determinable
17 impairments could reasonably be expected to cause some of his
18 alleged symptoms; however, the claimant's statements concerning the
19 intensity, persistence and limiting effects of his symptoms were not
20 found credible to the extent they were inconsistent with the ALJ's
21 RFC assessment. (Tr. 21.) At step four, the ALJ indicated that
22 Plaintiff has no past relevant work. (Tr. 25.) At step five, based
23 on the VE testimony and considering Plaintiff's age, education, work
24 experience and RFC, the ALJ found there were other jobs existing in
25 significant numbers in the national economy that Plaintiff could
26 perform, including assembler/small products, products inspector/
27 small parts and hand packager/packer inspector. (Tr. 26.) The ALJ
28 concluded Plaintiff had not been disabled since the application date
and was therefore ineligible for benefits under the Act. (Tr. 27.)

ISSUES

The question presented is whether the ALJ's denial of benefits

1 is supported by substantial evidence and free of legal error.
2 Plaintiff argues the ALJ erred when he improperly rejected the
3 opinions of James Goodwin, Psy.D., in favor of the state agency
4 reviewing physicians. Plaintiff contends that a remand is necessary
5 because the ALJ failed to account for the limitations identified by
6 Plaintiff's treating and examining medical providers in the
7 hypothetical presented to the VE. (ECF No. 14.)

8 DISCUSSION

9 In making his RFC determination in this matter, the ALJ
10 accorded weight to the opinions of reviewing state agency
11 psychological consultants, James Bailey, Ph.D., and Mary A. Gentile,
12 Ph.D. (Tr. 25), and specifically determined that the opinions of
13 James Goodwin, Psy.D., A. Ashleigh Keyser, M.D., and Brett McDonald,
14 M.S., L.M.H.C., were not persuasive evidence that Plaintiff suffered
15 greater restrictions from a psychological standpoint. (Tr. 23-25.)

16 The courts distinguish among the opinions of three types of
17 physicians: treating physicians, physicians who examine but do not
18 treat the claimant (examining physicians) and those who neither
19 examine nor treat the claimant (nonexamining physicians). *Lester v.*
20 *Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating physician's
21 opinion is given special weight because of his familiarity with the
22 claimant and her physical condition. *Fair v. Bowen*, 885 F.2d 597,
23 604-605 (9th Cir. 1989). Thus, more weight is given to a treating
24 physician than an examining physician. *Lester*, 81 F.3d at 830.
25 However, the treating physician's opinion is not "necessarily
26 conclusive as to either a physical condition or the ultimate issue
27 of disability." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.

1 1989) (citations omitted). The Ninth Circuit has held that "[t]he
2 opinion of a nonexamining physician cannot by itself constitute
3 substantial evidence that justifies the rejection of the opinion of
4 either an examining physician or a treating physician." *Lester*, 81
5 F.3d at 830. Rather, an ALJ's decision to reject the opinion of a
6 treating or examining physician, may be *based in part* on the
7 testimony of a nonexamining medical advisor. *Andrews v. Shalala*, 53
8 F.3d 1035, 1043 (9th Cir. 1995). The ALJ must also have other
9 evidence to support the decision such as laboratory test results,
10 contrary reports from examining physicians, and testimony from the
11 claimant that was inconsistent with the physician's opinion.
12 *Andrews*, 53 F.3d at 1042-1043.

13 Nonexamining physician Bailey indicated on March 14, 2008, that
14 Plaintiff was capable of simpler tasks, can concentrate on concrete
15 tasks, could work around others but not with high levels of
16 cooperation, could have superficial public and coworker contact and
17 may need to be shown some changes. (Tr. 430.) Dr. Bailey noted no
18 greater than moderate limitations with respect to Plaintiffs mental
19 functioning. (Tr. 438-429.) Dr. Gentile affirmed Dr. Bailey's
20 report on December 3, 2008. (Tr. 501.) The ALJ based his mental
21 RFC determination on the opinions of these reviewing state agency
22 physicians. (Tr. 25.)

23 On August 2, 2005, Dr. Goodwin examined Plaintiff. (Tr. 257-
24 262.) Dr. Goodwin noted that, on examination, "severe deficits"
25 were evidenced in attention and concentration. (Tr. 257.) He
26 indicated that Plaintiff is socially isolated and the general
27 quality of his interactions with others could be described as
28

1 dependant. (Tr. 258.) "Specific interpersonal problems were noted
2 in peer social relations, marital relations, intimate relations, and
3 interactions with authorities." (Tr. 258.) Plaintiff was diagnosed
4 with Major Depressive Disorder, Recurrent Moderate-Severe;
5 Polysubstance Dependence, Early Partial Remission; and PTSD. (Tr.
6 258.) Plaintiff was given a Global Assessment of Functioning (GAF)
7 score of 45.² Dr. Goodwin opined that Plaintiff had severe
8 limitations on his abilities to relate appropriately to co-workers
9 and supervisors and respond appropriately to and tolerate the
10 pressure and expectations of a normal work setting and marked
11 limitations on his abilities to learn new tasks, exercise judgment
12 and make decisions, interact appropriately in public contacts, and
13 control physical or motor movements and maintain appropriate
14 behavior. (Tr. 261.)

15 On June 5, 2007, Dr. Goodwin again examined Plaintiff. (Tr.
16 231-236.) Dr. Goodwin noted that, on examination, "severe deficits"
17 were evidenced in attention and concentration and there was evidence
18 of social phobia. (Tr. 231.) He indicated that Plaintiff is
19 socially isolated and the general quality of his interactions with
20 others could be described as avoidant. (Tr. 232.) "Specific
21 interpersonal problems were noted in peer social relations, marital
22 relations, intimate relations, and interactions with authorities."

23
24 ² A GAF of 50-41 reflects: "[s]erious symptoms (e.g., suicidal
25 ideation, severe obsessive rituals, frequent shoplifting) or any
26 serious impairment in social, occupational, or school functioning
27 (e.g., no friends, unable to keep a job)." DIAGNOSTIC AND STATISTICAL
28 MANUAL OF MENTAL DISORDERS-IV 32 (4th ed. 1994).

1 (Tr. 223.) Plaintiff was diagnosed with Major Depressive Disorder,
2 Recurrent Moderate-Severe; Polysubstance Dependence, Partial
3 Remission; and PTSD. (Tr. 232, 234.) Plaintiff was again given a
4 GAF score of 45. Dr. Goodwin opined that Plaintiff had severe
5 limitations on his abilities to relate appropriately to co-workers
6 and supervisors and to respond appropriately to and tolerate the
7 pressure and expectations of a normal work setting and marked
8 limitations on his abilities to exercise judgment and make decisions
9 and interact appropriately in public contacts. (Tr. 235.)

10 Plaintiff was again examined by Dr. Goodwin on October 16,
11 2007. (Tr. 222-227.) Dr. Goodwin again noted that "severe deficits"
12 were evidenced in attention and concentration and there was evidence
13 of social phobia. (Tr. 222.) He again indicated that Plaintiff is
14 socially isolated and the general quality of his interactions with
15 others could be described as avoidant. (Tr. 223.) "Specific
16 interpersonal problems were noted in peer social relations, marital
17 relations, intimate relations, and interactions with authorities."
18 (Tr. 223.) Plaintiff was diagnosed with Major Depressive Disorder,
19 Recurrent Moderate-Severe; Polysubstance Dependence, Early Full
20 Remission; and PTSD. (Tr. 223, 225.) Plaintiff was given a GAF
21 score of 47. Dr. Goodwin again opined that Plaintiff had severe
22 limitations on his abilities to relate appropriately to co-workers
23 and supervisors and to respond appropriately to and tolerate the
24 pressure and expectations of a normal work setting and marked
25 limitations on his abilities to exercise judgment and make decisions
26 and interact appropriately in public contacts. (Tr. 226.)

27 The ALJ rejected the opinions of Dr. Goodwin because they were
28

1 not consistent with the state agency reviewing physicians' opinions
2 and because the limitations assessed on the check-box forms went
3 beyond those found in the mental status examination. (Tr. 23.) The
4 ALJ "presumed" Dr. Goodwin relied mostly on the claimant's
5 subjective reporting when completing the forms. (Tr. 23.) For the
6 reasons provided below, the undersigned finds that the rationale
7 provided by the ALJ for rejecting Dr. Goodwin's opinions is
8 insufficient.

9 First, the ALJ's assertion that he presumed that Dr. Goodwin
10 relied mostly on Plaintiff's non-credible subjective reporting is
11 not a valid reason to reject the doctor's opinions. This belief is
12 not substantiated and amounts to speculation on the part of the ALJ.

13 Second, the ALJ's finding that the limitations assessed by Dr.
14 Goodwin on the check-box forms go beyond those discussed in the
15 mental status examination is incorrect. The narrative portions of
16 Dr. Goodwin's reports note "severe deficits" are evidenced in
17 attention and concentration, there is evidence of social phobia,
18 Plaintiff is socially isolated, and "[s]pecific interpersonal
19 problems were noted in peer social relations, marital relations,
20 intimate relations, and interactions with authorities." See *infra*.
21 These findings by Dr. Goodwin are consistent with the determinations
22 he made on the accompanying check-box forms.

23 Finally, as noted above, the opinion of a nonexamining
24 physician cannot by itself constitute substantial evidence that
25 justifies the rejection of the opinion of an examining or treating
26 physician, *Lester*, 81 F.3d at 830, and the reviewing state agency
27 physicians are the only medical professionals of record who
28

1 contradict the findings of Dr. Goodwin. Dr. Goodwin's opinions are
2 consistent with all other medical providers of record.

3 In November 2005, A. Ashleigh Keyser, M.D.,³ completed a
4 physical evaluation of Plaintiff and opined that depression and
5 likely PTSD would markedly to severely interfere with Plaintiff's
6 ability to communicate and follow directions (Tr. 269) and had made
7 it impossible for Plaintiff to maintain a job. (Tr. 270.) On
8 January 28, 2008, Marie Carmel Desire, M.D., examined Plaintiff,
9 diagnosed Depressive Disorder, NOS, possibly due to PTSD; PTSD,
10 chronic; Insomnia due to PTSD, and Anxiety Disorder, NOS, possibly
11 due to PTSD, and gave Plaintiff a GAF score of 45-51. (Tr. 411-
12 412.) The ALJ did not discuss the medical report of Dr. Desire. On
13 September 22, 2008, treating mental health counselor Brett McDonald,
14
15
16

17
18 ³ The ALJ rejected Dr. Keyser's assessment because Dr. Keyser
19 did not provide objective evidence or a detailed explanation for the
20 findings and it seemed that Dr. Keyser relied mostly on Plaintiff's
21 subjective reporting. (Tr. 24.) Although Dr. Keyser merely filled
22 out a check-box form, the state agency reviewing physician, whose
23 opinion the ALJ accorded significant weight, used a similar check-
24 box evaluation form, and the ALJ did not explain why a check-box
25 form completed by the nonexamining physician was entitled to more
26 weight than the check-box form completed by Dr. Keyser.
27 Furthermore, like Dr. Goodwin, the ALJ's assumption that Dr. Keyser
28 relied on Plaintiff's subjective reporting is again unsubstantiated.

1 M.S., L.M.H.C.,⁴ diagnosed Plaintiff with depression, NOS; PTSD,
2 chronic; insomnia due to PTSD; and an anxiety disorder, NOS, and
3 indicated Plaintiff was "seriously disturbed." (Tr. 540, 542.) Mr.
4 McDonald opined that Plaintiff was severely limited in his ability
5 to respond appropriately to and tolerate the pressure and
6 expectations of a normal work setting and had marked limitations in
7 his abilities to understand, remember and follow complex
8 instructions, learn new tasks, exercise judgment and make decisions
9 and relate appropriately to co-workers and supervisors. (Tr. 541.)
10 The foregoing medical reports are consistent with the opinions
11 articulated by Dr. Goodwin on exam.

12 In summation, the ALJ's presumption that Dr. Goodwin relied
13 mostly on Plaintiff's subjective reporting is unsubstantiated, the

14 ⁴ The ALJ also rejected Mr. McDonald's opinions. (Tr. 24.)
15 The ALJ asserted Mr. McDonald did not provide objective evidence to
16 substantiate his findings, used only a check-off form and indicated
17 limitations that are beyond the evidence. (Tr. 24.) However, Mr.
18 McDonald is a treating medical provider, the relied upon state
19 agency reviewing physician used a similar check-box form, and Mr.
20 McDonald's assessed limitations are consistent with the findings of
21 all medical providers of record, with the exception of the state
22 agency reviewing physicians. While the ALJ correctly noted that Mr.
23 McDonald's opinions do not qualify as medical evidence from an
24 acceptable medical source as required by the Social Security
25 Regulations, 20 C.F.R. §§ 404.1513, 416.913, the opinion from this
26 treating medical source is persuasive, especially given that it is
27 consistent with the weight of the record evidence.
28

1 ALJ's finding that the limitations assessed by Dr. Goodwin go beyond
2 those discussed in his examination is without merit, and Dr.
3 Goodwin's opinions are consistent with the opinions of all medical
4 professionals of record, with the exception of the state agency
5 reviewing physicians, and the opinion of nonexamining physicians
6 cannot by itself constitute substantial evidence that justifies the
7 rejection of the opinion of an examining or treating physician.
8 *Lester*, 81 F.3d at 830. The ALJ formulated reasons to reject the
9 opinions of Dr. Goodwin, Dr. Keyser and Mr. McDonald; however, as
10 discussed above, the ALJ's rationale in this regard is insufficient.
11 Accordingly, it is this court's determination that the ALJ failed to
12 provide "specific" and "legitimate" reasons for rejecting the
13 opinions set forth by Dr. Goodwin, Dr. Keyser, Dr. Desire and Mr.
14 McDonald in favor of the opinions of the state agency medical
15 consultants. *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995).
16 Because the ALJ failed to introduce limitations assessed by these
17 medical professionals in a hypothetical to a VE, this matter must be
18 remanded for additional proceedings.

19 On remand, the ALJ shall reassess Plaintiff's mental residual
20 functional capacity, taking into consideration the opinions of all
21 medical professionals of record, as well as any additional or
22 supplemental medical evidence relevant to Plaintiff's claim for
23 disability benefits. The ALJ shall additionally elicit the
24 testimony of a medical expert at a new administrative hearing to
25 assist the ALJ in formulating a new residual functional capacity
26 determination. Plaintiff's new RFC assessment should be presented
27 to a vocational expert to determine if Plaintiff is capable of
28

1 performing any other work existing in sufficient numbers in the
2 national economy.

3 **CONCLUSION**

4 The court has the discretion to remand the case for additional
5 evidence and findings or to award benefits. *Smolen v. Chater*, 80
6 F.3d 1273, 1292 (9th Cir. 1996). The court may award benefits if the
7 record is fully developed and further administrative proceedings
8 would serve no useful purpose. *Id.* Remand is appropriate when
9 additional administrative proceedings could remedy defects.
10 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case,
11 further development is necessary to remedy defects and for a proper
12 determination to be made. Accordingly,

13 **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
15 **GRANTED, IN PART**, and the matter is remanded to the Commissioner for
16 additional proceedings consistent with this order.

17 2. Defendant's Motion for Summary Judgment (**ECF No. 19**) is
18 **DENIED**.

19 3. Application for attorney fees may be filed by separate
20 motion.

21 The District Court Executive is directed to file this Order and
22 provide a copy to counsel for Plaintiff and Defendant. Judgment
23 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

24 DATED September 6, 2012.

25
26 S/ CYNTHIA IMBROGNO
27 UNITED STATES MAGISTRATE JUDGE
28